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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1971

NO. ———

M. M. POWELL ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

## *BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS*

## QUESTION PRESENTED

1. Whether the Prosecuting Attorney denied to the Petitioner a fair trial by commenting on the Petitioner's failure to take the witness stand.

## REASONS FOR DENYING THE WRIT

1. Whether the Prosecuting Attorney denied to the Petitioner a fair trial by commenting on the Petitioner's failure to take the witness stand.

This point presents no substantial federal question in need of decision by this Court, and therefore certiorari should not be granted. There are no conflicting decisions among the various jurisdictions around the country with regard to this point. The law regarding this point was well settled by the United States Supreme Court's decision in *Griffin v. State of California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2nd 106 (1965).

Petitioner contends that the Prosecuting Attorney, on three different occasions during the trial, commented on his failure to take the stand. In response to defense counsel's remark that a question that he asked State's witness Richard Daniels on cross examination was "To bear out the defense's statement to the jury that the guns were here, and were to be delivered, and that my client was simply a broker to watch the money and see that the owners of the guns got it," the Prosecuting Attorney stated that, "Now, Your Honor, to which the State says that surely the defendant can testify in person and by personal knowledge." After this remark was made, a hearing was held in chambers on appellant's motion for a mistrial. The trial court overruled this motion and stated: "The Court will admonish the jury not to consider any statement made by the Prosecuting Attorney, and will phrase it in any fashion that will have less impact in the eyes of the defendant by merely telling the jury to completely disregard any statement having been made by the Prosecuting Attorney in objection to the question propounded by Mr. Foreman to the witness. Or the Court will go further, if the defendant through his counsel

requests, and advise the jury the defendant either has the right to testify or decline to testify in any criminal case, and if he declines to testify, he is exercising a constitutional right, and it certainly would be no evidence of his guilt." (T. 303)

Upon returning to open court, Judge Steel made the following remarks to the jury: "Members of the jury, do any of you remember — and I will ask you to express yourself by a show of hands — do any of you remember an objection made by Mr. Hardegree and just what he said in that objection just prior to this recess? I assume that you did not. I think two or three of us may have been talking at once. I didn't understand it either, but if any such objection was made by Mr. Hardegree, and I am sure one was made. I remember he made an objection. I am asking you at this time to wholly and completely disregard anything Mr. Hardegree may have said in making the objection into the record. Is there anyone who couldn't do that? Thank you." (T. 305-306)

Since the trial court determined that the jurors had not even heard the remark complained of, any possible error on the part of the Prosecuting Attorney became harmless, and did not tend to the prejudice of the substantial rights of the Petitioner on the merits. Ark. Stat. Ann. § 43-1012 (Repl. 1964).

Petitioner elected not to take the witness stand, and during the Prosecuting Attorney's closing remarks he stated as follows: "You know, Members of the Jury, I don't mind a defense counsel at all reminding the jury that his client is just as entitled to credibility by the jury as police officers are, and it's proper and right that you be questioned as to whether or not you would give more credence to the statement of a police officer than you would perhaps —" Petitioner's counsel objected to this statement by

the Prosecuting Attorney and his objection was sustained by the trial court. Petitioner asked for no further relief and should not now be heard to complain that the remark was prejudicial.

During his closing argument the Prosecuting Attorney also stated that, "But has the defendant, members of the jury, shown any reason why the credibility of Richard Daniels, William Sprecher, Robert Beckham, James Beech, James Lester, or any officer in this case, should be accepted at anything less than we would accept the testimony of a man who appears here, and whose credibility appears to be good."

"— the fact that the witness Penland's testimony stands unchallenged? Absolutely unchallenged. Mr. Penland wasn't even cross examined. He came in and told you how this man, Marshall Powell, had run a confidence game on him in Corpus Christi, Texas, and stolen that great amount of money from him, and the facts of that case with the exception of names, brands, times and places, was exactly identical. In substance it was exactly identical to this operation here, up to the point where Daniels was handed the bag, and he knew something was wrong. It was identical. But the witness Penland was not even challenged." (T. 579)

Respondent respectfully submits that neither of the above remarks can be interpreted as a comment on the Petitioner's failure to take the stand. The Prosecuting Attorney was simply pointing out that the defense had left unchallenged the testimony of the witnesses called by the State. The Prosecuting Attorney's remarks were proper because they amounted only to contentions that the testimony of the State's witnesses should be believed because their testimony remained uncontradicted. *Shaddox v. State,* 244 Ark. 747, 427 S.W. 2d 198; *Edens v. State,* 235 Ark. 996, 363 S.W. 2d 923; *Davis v. State,* 174 Ark. 891, 298 S.W. 359.

## CONCLUSION

The petition for a Writ of certiorari presents no serious constitutional issue in need of decision by this Court. Since no substantial Federal questions are presented, the Respondent respectfully submits that the Writ of certiorari should be denied.

Respectfully submitted,

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